



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 26 2000

LOCAL GOVERNMENT
ADVISORY COMMITTEE

Ms. Carol M. Browner
Administrator
U. S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Browner:

Enclosed please find the Local Government Advisory Committee (LGAC) and the Small Community Advisory Subcommittee (SCAS) recommendations regarding the Environmental Protection Agency's implementation guidance for the Federalism Executive Order (EO 13132). Each set of recommendations was adopted by their respective committee: SCAS recommendations at its March 2000 meeting; and, LGAC recommendations at its May 2000 meeting. Subsequently, both sets of recommendations were adopted by the full LGAC at its May meeting and are being forwarded for your consideration.

While we recognize that some of the recommendations included in both the LGAC and SCAS reports are similar, we ask that each set of recommendations be considered separately. The SCAS recommendations represent the distinct perspective of very small communities. We also would like to call your attention to several recommendations, listed below, which both reports have in common.

- We concur that EO 13132, if diligently applied, could effectively augment EPA's efforts to strengthen its partnership with States and local governments, including small local governments.
- We re-affirm the Order's central premise, which holds that issues that are not national in scope or significance are addressed most appropriately by the level of government closest to the people.
- We emphasize the necessity and the importance of coordination of any and all consultation as prescribed by EO 13132, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, or other statutes and policy directives.

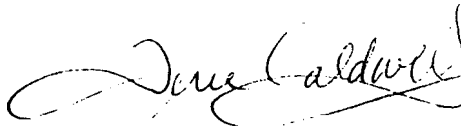
- We recognize the vital role played by Washington, D.C.-based intergovernmental associations, **such** as those **comprising** the Big 7; however, we believe there is no substitute for frequent and direct consultation with those directly involved in local government.

In closing, we want to thank you for allowing us the opportunity to review and comment on the Agency's **implementation guidance** for EO 13132; and, would like to commend the EPA staff who have invested in the effort to produce the guidance. By far, this is a **model** for other Federal agencies. For that reason, we would recommend that once in final form, the EPA document be distributed broadly to serve as a template for other agencies and departments.

Sincerely,



Anne R. Morton
Co-chair
Small Community Advisory
Subcommittee



Tere Caldwell-Johnson
Chair.
Local Government Advisory
Committee

Enclosures

cc: Denise Zabinski Ney, LGAC Designated Federal Officer
Steven R. Wilson, SCAS Designated Federal Officer
LGAC Committee Members
SCAS Committee Members

Federalism: A Local Government Advisory Committee Report

Introduction

In its capacity as an advisory committee to the Environmental Protection Agency (EPA), the Local Government Advisory Committee (LGAC) periodically makes recommendations and comments to the Agency on issues impacting local governments. Over the past three months the Committee has reviewed proposed EPA actions for implementation of Presidential Executive Order 13132: Federalism. The extraordinary interest of LGAC members in participating in this review is a clear indication of the desire to improve the effectiveness and cooperative spirit between Federal and local agencies. This report summarizes the LGAC's comments on Agency implementation proposals that were conveyed in two draft guidance documents: *Interim Guidance on Executive Order 13132: Federalism* and *Planning For Intergovernmental Outreach and Consultation*.

General Summary

The LGAC generally supports the overarching principles of Federalism Executive Order (EO 13132), and recognizes its potential significance in promoting successful interaction between local governments and Federal agencies. The Agency is genuinely applauded for its aggressive actions toward implementation, and its willingness to develop its implementation responses in an open and collaborative manner.

The following recommendations are comments directed specifically to the draft EPA materials, and just as importantly, they also reflect the years of local government experience represented by the LGAC's membership. This reflection highlights the benefit of the LGAC as a channel for communication between local governments and EPA.

A. Key Priority Comments

- The LGAC wishes to underline the Order's central premise, which holds that issues that *are not* national in scope or significance are most appropriately addressed by the level of government closest to the people.
- The LGAC approaches this proposed implementation process in terms of how the Executive Order's implementation builds upon already existing communication links between EPA, local agencies and community organizations. The purpose is NOT to reinvent the wheel, but to augment and support that Federal-community relationship.
- The LGAC believes that EO 13132, if diligently applied, could effectively augment EPA's efforts to strengthen its partnership with States and local governments.
- The LGAC believes that the *Fundamental Federalism Principles* cited in the Executive Order provides a solid foundation for meaningful cooperation between

- levels of government when there is development of policies or regulations that are of national scope or significance.
- The LGAC believes that guidance documents are only as good as their implementation. Without accountability and consistency these important objectives will not succeed. Therefore, EO 13132 cannot be successfully implemented within the Agency until there is direction to all staff that it is a priority. Therefore, an internal training component that holds the Agency and Office Directors accountable (via performance measurements or other administrative drivers) should be included.
- The LGAC believes that in addition to the Executive Order's implementation, Congressional mandates and deadlines for program development that do not allow ample time to meet with constituents (audience/customer) also need to be addressed realistically.
- The Committee cautiously advises that the New Federalism will be consistently applied in EPA's ten Regional Offices only if clear direction and accountability measures from Headquarters are in place. The LGAC believes that it is at the Regional level that local governments interact with the Agency on most issues, most often. **And**, it is the **Regions** that are most open to **partnering** with local governments in new and innovative ways.
- The Committee encourages EPA to give tangible assistance to reaching the goals of the EO 13132 by enhancing communication with Regional Offices, broadening definitions on consultations specifically in working with local offices and working to coordinate a more consistent level of communication between Regional **Offices**, local governments and associations.

B. EPA Requested Information

The following questions (**highlighted in bold**) were posed to the Committee by EPA staff. *LGAC member responses submitted are shown in italics.*

(1) What would constitute good consultation and what would be most beneficial for rule makers [EPA] to hear?

EO 13132 cannot be successfully implemented within EPA until there is direction to all staff that it is a priority.

The documents should emphasis that consultation outreach requests should be explained in layman's language.

(2) What is the proper mix of officials, and who should be contacted on individual consultation requests?

Individual local governments must have assurance that they are included in a contact group. It is felt that the Big Seven National Associations are a good starting point, but there is a concern that an "inside the beltway" mind-set does not adequately reflect those views of many local governments.

a) How to build and keep a current list of elected officials, etc.?

The LGAC can provide a list of members and the expertise of each to be a resource for the EPA.

*There are a **number** of meetings with **national** associations coming up very soon that could be a good forum for communication.*

b) Is it true that bigger cities have more expertise and should be automatically contacted?

*Bigger cities **have** more expertise in certain topic areas, and each city may have more expertise in a particular issue based on their **environmental** challenges. The **cookie-cutter** approach does not work.*

c) Is a good mix of sizes of cities and counties imperative?

*A good **mix** of sizes of cities and counties is imperative.*

C. General Comments

Below are listed specific comments from members of the LGAC concerning the review of the EPA guidance documents for EO 13132:

- The documents do not appear to have adequate accountability elements. Additional language needs to be included in these documents to SUPPORT utilization, DEFINE accountability, and CLARIFY consistency with implementing the Executive Order throughout the Agency.
- In the consultation planning guidance document there should be a flowchart similar to the one in the interim regulation/rules guidance document showing the consultation planning process.
- There is a need for non-technical language. The documents should emphasize that consultation outreach requests should be explained in layman's language. Concerns

- were voiced that often EPA documents, etc. are too technical. In communications, the audience must be kept in mind. In particular, communications with elected officials need to be in non-technical language.

Recommendations for EPA Implementation of Executive Order **13132** – Federalism

Small Community Advisory Subcommittee

March **3,2000**

I. Introduction

- SCAS believes that E.O. 13132, if diligently applied, could effectively augment EPA's efforts to strengthen its partnership with small local governments.
- In **particular**, SCAS wishes to re-affirm the Order's central premise which holds that issues ~~that~~ **are not** national in scope or significance are most appropriately addressed by the level of government closest to the people.
- Additionally, SCAS believes that the *Fundamental Federalism Principles* cited in the Order provide a solid foundation for **meaningful cooperation** between levels of government when developing policies or regulations which **are** of national scope or significance.
- Recognizing that many **of** the Order's specific provisions address – in broad, **non-specific fashion – various** methods for ensuring intergovernmental collaboration during **regulatory/policy** development, SCAS believes that EPA's implementation of the Order could be assisted through the conscientious application of policy guidance which is comprehensive, adaptable, and attentive to the special needs of small local governments.
- To that end, SCAS – having reviewed the Agency's draft *Interim Guidance on Executive Order 13132* – **has** identified several areas of concern.

II. Issues/Concerns with Draft Agency Guidance

- 1) **“Piecemeal”** Approach to Intergovernmental Relations - SCAS is concerned that Agency policy makers and staff involved in regulatory development may view the E.O. as just another “layer” of administrative requirements that must be met in order to promulgate policies and regulations. Such a “view” could cause Agency staff and policy makers to lose sight of the purpose of the E.O., and could have the effect of promoting a “pro-forma” or “bare minimum” mindset when it comes to consultation.
- 2) Inordinate Emphasis on “Elected” Officials - SCAS is concerned that the Agency guidance seems to overemphasize the importance of soliciting the views of elected officials while at the same time downplaying the importance of consultation with EPA’s “professional counterparts in State and local government.” Powerful elected officials will always be afforded access to Agency staff. This may not always be the case with non-elected officials, particularly those from small communities.
- 3) Inordinate Emphasis on “Representative National Organizations”ⁿ – Notwithstanding their prominent role in development of federal policy, SCAS believes that a serious “disconnect” exists between so-called “beltway” organizations and the state and local government constituencies they represent.
- 4) Need for Adequate Small Community **Representation/Consultation** - SCAS believes that when dealing with local units of government, no single national organization effectively represents all small communities.
- 5) Ambiguous **Language/Terminology** - Throughout the guidance, there are several terms which will likely be subject to varied interpretation among staff in the Agency's regulatory programs. Such varied interpretation, SCAS believes, could lead to inconsistent or otherwise inadequate consultation practices when developing regulations which have federalism implications. Below, in the section entitled “Recommendations”, the terms and phrases of concern to the Subcommittee – as well as suggestions for clarification – are put forth.
- 6) Other Issue and Language-Specific Concerns - In addition to those cited above, the Subcommittee has identified several issue and language-specific concerns which warrant attention. They, too, are identified and addressed in the section entitled “Recommendations.”

III

Recommendations

1) **Coordinated Approach to Intergovernmental Consultation -**

EPA guidance **must** impart the understanding that consultation, as prescribed by E.O.-13132, SBREFA, UMRA and other requirements, must be implemented in an integrated, coordinated fashion. These statutes and the E.O., while technically separate and discrete, **must** be viewed as a **means** to an end: **effective**, implementable environmental regulations and policies. To **that** end, and in addition to Agency guidance on E.O. 13132, EPA should develop and require the use of a single, comprehensive guidance document that addresses the entire range of consultative requirements vis a vis E.O. 13132, SBREFA and UMRA, as well as other policies – whether existing or **forthcoming** – which may require consultation. EPA should integrate this guidance into a formalized training curriculum for all regulatory staff.

2) **Role of Elected and Non-Elected Officials -**

SCAS acknowledges the existence of a perception within the Agency that current consultative efforts with local **governments** need to place a greater emphasis on elected officials. However, recognizing a continuing need to strengthen **consultation with** “**appointed**” or “**career**” local **government** professionals – upon whose experience the Agency has come to depend – SCAS believes that Agency policy should reflect its commitment to improving consultation with both elected **and** non-elected local **government** officials. **Signifying** this commitment, the Agency guidance for the E.O. should consistently refer to consultation with **both** types of officials.

3) **Representative National Organizations -**

While recognizing the vital role played by Washington, DC-based **intergovernmental** organizations, such **as** those comprising the “**Big 7**,” SCAS wishes to underscore its belief that there is no substitute for **frequent** consultation with those directly involved in local government management and service provision.

4) **Small Community Consultation -**

To ensure adequate **small** community consultation, EPA should establish an internal advocate for small communities, as well as an outreach network as described in SCAS' previously transmitted recommendations regarding implementation of SBREFA and UMRA.

5) **Clarification of Ambiguous Language/Terminology**

Because it provides clearer explanation for a number of potentially ambiguous terms, the document entitled ***Planning for Intergovernmental Outreach and Consultation*** should serve as the central framework for the guidance's provisions dealing with consultation. Additionally, SCAS believes that precise clarification of the following terms – to the extent possible – is absolutely essential if the E.O. is to be effectively implemented.

a) Meaningful and Timely Involvement

To be timely, initial consultation should be concurrent with the regulatory Tiering process, and should **continue** through **promulgation** and **implementation** of the final rule. The section of the Analytic Blueprint addressing consultation should itself be made available to state and local **officials** for review. EPA announcing its regulatory **plan/strategy** – with updates at various intervals – does not constitute meaningful consultation. Further, meaningful consultation goes beyond merely noting or cataloguing concerns raised. It is interactive, **transactional** and fully explorative of the entire range of **regulatory/policy** options. Additionally, it entails **prompt** Agency response to issues and concerns raised by small community representatives. In sum, the guidance should articulate – as well as reiterate in appropriate sections throughout the text – this "doctrine" of meaningful and timely consultation.

b) Rule of Reason

While supportive of the "formula" underpinning the "rule of reason" (p.17), SCAS believes that the terms "complexity" and "controversy" – as cited in the guidance – could easily be subject to individual interpretation. Therefore, SCAS encourages the **Agency** to develop and implement an effective oversight process to assist regulatory program **offices** in their development of consultation plans, thereby ensuring that the "rule of reason" is properly applied.

c) De Minimis/Reasonable Minimum Level Impacts

In addition to encouraging the use of a single, consistent phrase – such as "minimum level" – to describe impacts which trigger consultative processes (e.g. eliminating "de minimis"), SCAS believes that the guidance's use of imprecise terms (e.g. **reasonable**) provides too much interpretative latitude. To address this, SCAS believes that EPA should strive to eliminate terms and phrases that "open the door" to confusion or varied interpretation (e.g. "reasonable minimum", "to the extent practicable").

Additionally, the guidance's use of economics-based impact thresholds, such as "**\$100 million/annum**" and ">%1 of revenues", **appears** to be inconsistent throughout the document. For the sake of clarity, both economics-based thresholds – **\$100 million/annum and > %1** of revenues – should be cited where applicable throughout the guidance.

6) Addressing Other Issue and Language-Specific Concerns

a) Small Community definition is conspicuously absent. While SCAS recognizes that the E.O. applies to states and local governments of all sizes, "cross-referencing" with SBREFA and UMRA requirements and their applicable definitions might be helpful.

b) Federalism Summary Impact Statement triggers on page 8 of the guidance are somewhat confusing. SCAS recommends use of specific trigger references, rather than referring the reader

to rows and columns.

c) **OCIR** should receive relevant information as a matter of policy, rather than having to request it as cited on p.8.

d) **OCIR should be vigilant for "significant" post-proposal changes**, as referenced in p.9 provisions addressing new work group issues. Further, the guidance should provide a working definition for "significant changes," as used in this context.

e) **Several important passages from pages 1 - 4 in OCIR document of 2/4/00** (specify which) should be integrated into the Agency guidance.

f) (f.1) **Attachment 1.b, insert 2** was totally re-written. Original version should be re-instated. Also under this section: "operations committee" needs to be defined; under "Studies and Analyses", (f.2) first bullet language should be changed back to "including" rather than "both"; (f.3) significant impact trigger language was deleted – should refer to >1 of revenues to remain consistent; (f.4) fifth bullet on small communities was deleted & should be reinstated. (f.5) Insert 2 should include a network or pool of elected and non-elected officials, as well as FACA committees. 1.b Insert 3 - reinstate the deleted venues.,

g) **Throughout the guidance document, use of the phrase state or local government should be changed to state and local government.**

h) **References to SLEOs, SLOs, and SLG representatives should be consistent throughout the document.**

****) Outstanding Issues**

- 1) Committee would like opportunity to periodically review of subsequent drafts of guidance.
- 2) Subsequent drafts should include "redline/strikeout" format, clearly identifying changes in text/policy.
- 3) Committee seeks clarification regarding use of >1 of revenues formula for determining impact thresholds.
- 4) Principle of budget neutrality should be explained.